SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 223

SARA ADLER (NOW SARA COWLEY-BROWN),
Petitioner,

vs.

SIDNEY ADLER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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INDEX.

Subject Index.

Cases:

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Petition.

Petitioner, Sara Adler (now Sara Cowley-Brown), a resident of the City of Chicago, Cook County, Illinois, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois entered in the above cause on February 21, 1940 (R. 222-234) and rehearing denied April 10, 1940 (R. 279).

Summary Statement of the Matter Involved.

The decision of the Supreme Court of Illinois sought to be here reviewed affirms an order (Abs. 216-217) of the Circuit Court of Cook County, Illinois entered on May 8, 1939

in a divorce proceeding upon the petition (Abs. 8-39) of Sidney Adler by which the court modified the terms of a consent decree entered on December 2, 1922 (Abs. 5-8) with respect to payments provided therein to be made to Sara Adler.

The divorce proceeding was instituted by Sidney Adler against his wife Sara Adler and the divorce was decreed to him upon the ground of desertion (Abs. 5). A supplemental decree settled the matter of their marital and property rights (Abs. 5-8).

The payments provided for were provided for in trust agreements (Abs. 12-17, 56-62; 17-24, 24-35) which were ratified by the decree, and were to be made by trustees, to whom property was conveyed to manage; those payments were claimed by Sidney Adler in his petition to be "alimony" payments.

The petition for modification was made on two grounds: *First:* That an amendment to the divorce statute of Illinois in force July 13, 1933 which provided that "a party shall not be entitled to alimony and maintenance after remarriage" is self executing and that Sara Adler who remarried in 1924 was not entitled to alimony thereafter (Abs. 9-10). *Second:* That because of changed circumstances of the parties the payments provided in the consent decree should be reduced (Abs. 10-11).

Sara Adler claims the payments are due under a property settlement creating a life estate for her life by an irrevocable trust is a property right, not alimony, and not subject to reduction or modification and that the contracts and decree say remarriage shall not affect her rights (Abs. 40-42; 49-51) and that any modification of the decree will violate her constitutional rights under paragraph one of Section 10 of Article I and the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States (Abs. 42-43).

The petition of Sidney Adler was referred to the Master in Chancery who found the decree of November 20, 1922, to be a provision for alimony (Abs. 73) though the *petition of Sidney Adler* for modification called it a provision *in lieu of alimony* (Abs. 11) and found that the amended provision of the divorce act in 1933, Section 18, providing for the abolition of alimony on remarriage applied to all decrees, whether rendered before or after the amendment (Abs. 74-75) and found a change in financial condition (Abs. 75). He recommended the abrogation of the $4,600.00 yearly payments, the total amount affected by the decree of 1922, on the ground of the amendment of the Statute, the remarriage, and a change in financial condition.

On May 8, 1939, the court approved the Master's report and entered a decree discharging Sidney Adler from the obligation of paying Sara Adler alimony of $4,600.00 provided in the supplemental trust agreement of December 2, 1922, effective from the date of the petition, May 22, 1936 (Abs. 216). The court also decreed that the trustees under the trust agreement and conveyances shall pay the income from the supplemental trust back to Sidney Adler instead of to Sara Adler, as provided in the contract, the trust, and in the decree (Abs. 217), that is, the amount above the $5,400.00 yearly ($1,350.00 quarterly), which was provided in the first trust in 1920.

The Supreme Court of Illinois on appeal held that the property settlement and trust arrangement and provisions thereof, having been incorporated in the decree, became merged therein and were thereby transformed into alimony provisions (R. 230, 232) and that the act of 1933, which provides that remarriage deprives the divorced wife of right to further alimony, operated to cut off the rights of Sara Adler under the contracts and decree; and that the trustee arrangement, having thus taken the form of alimony payments, to be made by the trustees, the provisions of the

decree as to such payments was subject to change under the statute of the State which authorized the modification of alimony allowances as the fortunes of the parties may from time to time change (R. 231-232).

The opinion was filed in said cause in the Supreme Court of Illinois on February 21, 1940 (R. 221-232). A petition for rehearing was filed (R. 235) in said court which was denied on April 10, 1940 (R. 279).

It is contended that the decision of the trial court and the Supreme Court of Illinois has violated and voided the obligations of the contracts between the parties and thereby destroyed the vested rights of Sara Adler in the trust property and the income thereof and has taken her property without due process of law.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, 28 U. S. C. A. Sec. 344 (b).

The grounds upon which the petitioner seeks to invoke the jurisdiction of this Court is that Art. I, Section 10 of the Federal Constitution prohibiting the impairment of the obligation of contract and the due process clause of Section 1 of the 14th Amendment to the Federal Constitution were violated by the decision of the Supreme Court of the State of Illinois in this case. These constitutional questions were raised in the pleading of the petitioner herein in answer to the petition of the respondent who was seeking a modification of the divorce decree entered in 1922. In paragraph 5 of the answer (Abs. 42-43) it is alleged that Section 18 of Chapter 40 of Illinois Revised Statutes, as amended July 13, 1933, in so far as that amendment is applied to this decree "deprives respondent of her prop-

erty without due process of law, impairs obligations of contracts and contravenes and violates the first paragraph of Section 10 of Article I and the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States of America and is unconstitutional and void and further contravenes and violates Section 2 of Article II and Section 14 of Article II of the Constitution of the State of Illinois and is unconstitutional and void" (see also Par. 11 (Abs. 49-51) of the Answer).

The constitutional issue of destroying vested property rights is again raised in the amended answer in Par. 2 and 3 (Abs. 68) wherein it is alleged that the trust agreements and trust indenture conveyed to and vested in respondent "an irrevocable life estate that can not be taken from her or reduced or modified or any manner impaired without her consent and without consent of said trustees."

The constitutional issues were again raised in the objections to the Master's Report in Par. 4 (Abs. 205) and Pars. 26 to 30 (Abs. 211-212) on destroying vested property rights; and in Par. 7 (Abs. 206) and Par. 30 (Abs. 212-213) on impairing the obligations of contract and destroying vested rights by applying a subsequently enacted State statute retrospectively to a prior decree.

Objection was made to the Master's Report in Par. 26-30 (Abs. 211-212) on the ground that the supplemental trust indenture and supplemental trust agreement of December 1, 1922, vested an equitable and irrevocable life estate in the real estate thereby conveyed, and in not finding that said equitable life estate cannot be in any way modified, impaired, or divested.

Objection was made to the Master's Report in Par. 30 (Abs. 212-213) on the ground that "If the amendment enacted in 1933 to Section 18 of Chapter 40 of the Divorce Act, providing that a party shall not be entitled to alimony and

maintenance after remarriage, were construed to be applicable to decrees entered and remarriages contracted prior to the date of its enactment, said statute as amended would be unconstitutional and in violation of the first paragraph of Section 10 of Article I, and the 5th Amendment and the 14th Amendment of the Constitution of the United States and in violation of Sections 2 and 14 of Article II of the Constitution of the State of Illinois."

The Master reported among other things as follows:

> "In the year 1933, the Legislature of this state amended Section 18, Chapter 40 of the Divorce Act by providing, among other things as follows: 'And provided further that a party shall not be entitled to alimony and maintenance after remarriage.' This amendment became effective in July, 1933, and has not since been repealed and is still in force. The respondent, Sara Adler, remarried in the year 1924 * * * The language of the statute as amended is very definite and makes no exception, and in the opinion of the Master the situation of the parties involved in this proceeding comes clearly within the language of the amendment."

The objections to the Master's Report stood as exceptions (Abs. 215). The judge overruled said exceptions (Abs. 216) and decreed that the trustees under the supplemental trust and agreement of December 1, 1922, pay the $4,600.00 annually to the husband instead of the wife as provided in the contract, trust, and the decree (Abs. 216-217). An appeal was taken (Abs. 217) directly to the Supreme Court, a constitutional question being involved.

The Supreme Court in this case said:

> "The appeal has been brought direct to this court because the validity of the act of 1933 amending Section 18 of the Divorce Act is questioned. Laws of 1933, p. 490; Ill. Rev. Stat., 1939, Chap. 40, Par. 19" (R. 224).

The State Supreme Court ruled on the application of the legislative act of 1933 as applicable to a former decree as follows:

> "The questioned provision of the amendment of Section 18 of the Divorce Act is the proviso that a party shall not be entitled to alimony and maintenance after remarriage. It is urged that if this clause is given effect, and respondent's right to alimony taken away by reason of her remarriage, it takes from her vested rights contrary to the constitutional guarantees" (R. 231).
>
> "Her rights became fixed as to accrued payments, but as to all payments maturing in the future she had no vested right. The trial court did not undertake to give the statute a retroactive effect for the decree made the modification effective as of the date of the filing of the petition. The amendment of 1933 to Section 18 of the Divorce Act does not affect any vested rights of respondent" (R. 232).

The State Supreme Court ruled on the question of vested rights as follows:

> "The question presented is whether the provision in the supplemental instruments of December 1, 1922, and the decree of December 2nd for the quarterly payment of $1150.00, was an allowance of alimony and subject to modification under Section 18 of the Divorce Act, or was it a final settlement in gross, of all the interest of the parties arising out of the marital relation, and therefore, beyond the power of the court to modify or change" (R. 224).

The Supreme Court of Illinois affirmed the decision destroying the contract and trust (R. 232).

In the petition for rehearing the question of vested property rights was again raised (R. 238-242) specifically (R. 240-241) as follows:

> "Since, by uniform decisions of the courts of Illinois, the divorce court could not modify or abrogate or take away an award of a definite sum or of specific property or estate therein, that award in the case at bar was not contingent but vested, and being vested, it is not subject to divestiture or modification or impairment whether it arose out of and depended upon the trust indenture and agreement or arose out of and depended upon the decree of December 2, 1922. Any divestiture or impairment of that vested property interest is and must be a violation of Respondent's constitutional rights, not only under the Constitution of the State of Illinois but also under the First Paragraph of Section 10 of Article I, and the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States as pleaded in Respondent's answer."

In a petition for rehearing the question of impairing the obligation of contract was raised (R. 250) as follows:

> "The court erred in overruling respondent's contention that the amendment of 1933, making the cancellation of alimony mandatory after remarriage could not be constitutionally made retroactive as against the preceding decree of December 2, 1922."

The Supreme Court ruled against petitioner on all constitutional grounds and affirmed the trial court in toto (R. 233).

The Court Has Jurisdiction to Hear the Questions Involved.

This Court has jurisdiction because Federal questions of substance and importance were involved. The questions were decided wrongly by the Supreme Court of the State of Illinois and the Federal questions were vital and necessary to the decision.

Murdock v. *Memphis,* 1874, 20 Wall. (87 U. S.) 590.

The Supreme Court of Illinois erred in that the decision of the court destroyed a contract and a trust conveyance; by declaring them merged into a decree of alimony; by applying Section 18 of the Statute of Illinois; by permitting a modification of alimony, thereby destroying the petitioner's property rights without due process of law under Section 1 of the 14th Amendment of the United States Constitution.

Also the Supreme Court of Illinois erred by applying an amendment of 1933 to Section 18 retroactively to the contracts, conveyances and decree of 1922, thereby not only destroying vested rights without due process, but also impairing the obligation of contract under Article I, Section 10 of the Federal Constitution.

Section 18, Chapter 40 of the Illinois Statutes (Ill. Rev. Stat., Hurd, 1921, Chap. 40, Sec. 19) in existence at the time of the decree, contracts, and conveyances in question reads as follows:

> "Alimony—* * * When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, * * * as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just; * * * And the court may, on application, from time to time, make such alteration in the allowance of alimony and maintenance, * * * as shall appear reasonable and proper.

Section 18, Chap. 40, of the Illinois Statutes (Ill. Rev. Stat., 1940, Chap. 40, Sec. 19) as amended in 1933, reads as follows:

> "Alimony—* * * When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife * * * as from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just; * * * *provided further that a party shall not be entitled to alimony*

and maintenance after remarriage. And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance * * * as shall appear reasonable and proper."

The Statute was applied retroactively.

Fuller v. *Fuller,* 49 R. I. 6, 139 Atl. 662;
Livingston v. *Livingston,* 173 N. Y. 377, 66 N. E. 123;
Sistare v. *Sistare,* 218 U. S. 1.
Krauss v. *Krauss,* 127 App. Div. 740, 111 N. Y. Supp. 788;
Blethen v. *Blethen,* 117 Wash. 431, 32 Pac. (2) 534.

The non-Federal questions in the case are not of such controlling influence on the whole case that they are alone sufficient to support the judgment.

Indiana ex rel. Anderson v. *Brand,* 303 U. S. 95;
Rogers v. *Hennepin,* 240 U. S. 184;
Bacon v. *Texas,* 163 U. S. 297;
Mobile & Ohio Ry. v. *Tennessee,* 153 U. S. 486;
Wilmington & Weldon Railway Co. v. *Ashbrook,* 146 U. S. 279;
Murdock v. *Memphis,* 20 Wall. 590 (87 U. S.).

The court erred and destroyed vested property rights in applying Section 18 of said Statute to the contract and conveyances herein, regardless of when its provisions were enacted.

Scott v. *Jones* (1846), 4 Wall. 420, 427 ("It is said that the act upon its face does not purport to be repugnant to the Constitution or laws of the United States. If this be admitted, it by no means follows that the act is constitutional. Whether constitutional or not must be determined by the effect of the act.").

Furman v. *Nichol,* 1869, 8 Wall. 44.

Louisville Gas Co. v. *Citizens' Gas Co.,* 115 U. S. 683, 697 ("Whether an alleged contract arises from State legisla-

tion, or by agreement with the agents of a State, by its authority, or by stipulations between individuals exclusively, we are obliged upon our own judgment and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the Constitution of the United States.")

Kansas City Southern Railway v. *Albers Commission Co.*, 223 U. S. 573, 593.

Northern Pacific Ry. Co. v. *North Dakota*, 1915, 236 U. S. 585, 593. (The court will review the finding of facts where a conclusion of law as to a Federal right and finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Questions Presented.

The questions presented are:

Where in a decretal provision for alimony payments for the life of the divorced wife it is provided by contract ratified in a consent decree that remarriage of the divorced wife shall not affect her right to such payments, does a modification by total reduction of such payments, over her objection, under a statute, in force at the time of the decree, permitting reduction under changed conditions of the parties, deprive her of a vested right in violation of her constitutional rights under Section 1 of the 14th Amendment to the Federal Constitution.

Where by consent alimony payments allowed in a decree are an enlargement upon the obligation of the husband to support, *i. e.*, payments for the life of the wife and regardless of her remarriage, may such payments be modified at the instance of the divorced husband and over the objections of the divorced wife, because of changed financial conditions of the divorced husband under a statute in force

at the time of the decree allowing reductions of alimony because of changed conditions of the parties without depriving the divorced wife of property without due process of law.

Can a consent of alimony decree which provides payments for life of the divorced wife and regardless of her remarriage be modified to her detriment without her consent upon petition of the divorced husband alleging as a ground his adverse financial conditions under a statute allowing modification of *alimony decrees* upon change in the financial circumstances of the parties without depriving the divorced wife of property without due process of law.

Does a consent decree confirming a property settlement in a divorce proceeding awarding the divorced wife certain payments for her life and regardless of her remarriage to be received by her "as and for her permanent alimony and as a complete and final settlement of all her rights of dower, alimony, property, and other rights and claims" against her divorced husband, create such a vested right that it cannot be set aside under a subsequently enacted statute providing that a party shall not be entitled to alimony and maintenance after remarriage, without violating her constitutional rights in impairing the obligation of contract, and destroying vested rights.

Whether a consent decree in a divorce action can be modified on the ground of remarriage and changed financial condition under an existing State statute which provides for modification of alimony (future) on a showing of changed circumstances, as to payments to be made to the wife in accordance with a contract and trust indenture incorporated therein without depriving the wife of property without due process of law under Section 1 of the 14th Amendment to the Federal Constitution, where the decree approves and affirms the said contract and trust indenture, which pro-

vides for payments to the wife quarterly from the rents and profits of a trust conveyance for her natural life, even though, she may remarry which provisions could not be decreed except by consent, and where the decree further settles all of her rights of dower, alimony, and other rights and claims, and specifically says "no subsequent marriage of said Sara Adler shall affect this decree or any or all of the indentures or agreements in this decree referred to."

Where under a property settlement contract and a consent decree confirming it, a divorced wife is awarded alimony payments during her life and regardless of her remarriage and where such provision was lawful at the time of the entry of the consent decree, can such payments be abrogated under a subsequently enacted statute which provides that "a party shall not be entitled to alimony and maintenance after remarriage" without depriving the divorced wife of the benefit of her contract under Article 1, Section 10, of the Federal Constitution, and without destroying her property rights as protected by Section 1 of the 14th Amendment of the Federal Constitution.

Can the State court destroy, not just the personal obligation of a decree in a divorce proceeding, but also a contract and trust settlement which were declared valid by the court itself, by saying it is merged in the decree as alimony although it was a full and final settlement of alimony, dower and all property rights according to both the wording of the contract and the trust, and also the decree itself.

Reasons Relied On for Allowance of the Writ.

The decision of the State Supreme Court in applying a State statute passed in 1933 to a decree rendered in 1922 but at the same time denying it is retroactively applied in violation of a vested right because it affected only payments from the date of the petition to modify that decree filed in

1936, raises an important question of Federal law which has been, either directly or in substance, decided in the State courts of last resort contrary to the decision of the State court herein, but has not been directly passed on by this Court, and insofar as it has been touched upon, the decisions are to the contrary. It should be heard because the statute was passed subsequent to the contract and the decree; the statute was wrongly and retroactively applied; and the statute was given substantial weight in the decision in the cause.

Blethen v. *Blethen,* 117 Wash. 431, 32 Pac. (2) 543;
Livingston v. *Livingston,* 173 N. Y. 377, 66 N. E. 123;
Krauss v. *Krauss,* 127 App. Div. 740, 111 N. Y. Supp. 788;
Fuller v. *Fuller,* 49 R. I. 6, 139 Atl. 662;
Walker v. *Walker,* 155 N. Y. 77, 49 N. E. 663;
Goodsell v. *Goodsell,* 82 App. Div. 65, 81 N. Y. S. 806;
Sistare v. *Sistare,* 218 U. S. 1.

The decision in this case, contrary to decisions in the court of last resort in several States, destroys, not just the personal obligation of the decree, but also destroys a trust settlement and contract declared to be valid by the court itself by the simple process of calling the contract and trust, alimony, and by declaring the contract merged in the decree, thereby raising an important question of Federal law frequently before the State courts but not heretofore before this Court, and therefore without the guiding influence of a Federal decision in protecting rights guaranteed in the 14th Amendment and by Section 10, Article I of the Federal Constitution; and a denial of this writ will add increased force to the taking of such rights.

North v. *North,* 1936, 339 Mo. 1226, 100 S. W. (2) 582, 109 A. L. R. 1061;

Dickey v. *Dickey,* 1928, 154 Md. 675, 151 Atl. 387, 58 A. L. R. 634;
Spear v. *Spear,* 1930, 158 Md. 672, 149 Atl. 468;
Barnes v. *American Fertilizer Co.,* 1935, 144 Va. 692, 130 S. E. 902;
Moore v. *Crutchfield,* 1923, 136 Va. 20, 116 S. E. 482;
Renick v. *Renick,* 1933, 247 Ky. 628, 57 S. W. (2d) 663;
Stoutenburg v. *Stoutenburg,* 285 Mich. 505, 281 N. W. 305;
Schnitzer v. *Buerger,* 237 App. Div. 632, 262 N. Y. S. 385;
Pryor v. *Pryor,* 1908, 88 Ark. 302, 114 S. W. 700;
Goldman v. *Goldman,* 1940, 282 N. Y. 296, 26 N. E. (2d) 265;
Helvering v. *Fuller,* 1940, 60 Sup. Ct. 784;
Commissioner of Int. Rev. v. *Tuttle,* 1937, 6th Circuit 89 F. (2d) 112.

Conclusion.

It is therefore respectfully requested that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment of the Supreme Court of the State of Illinois.

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BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Supreme Court of the State of Illinois sought to be reviewed is reported in 373 Ill. 361, 26 N. E. (2d) 504, as case entitled *Adler* v. *Adler*, and is also reproduced in the record filed herein (R. 222-232).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, 28 U. S. C. A. Sec. 344 (b), and in accordance with the statements set forth in the accompanying petition for writ of certiorari under the heading "Jurisdiction" (*Supra*, pp. 4-11) which statement is adopted as the statement on which jurisdiction of this Court is invoked in this brief in support of the petition for certiorari. The date of the final judgment of the Supreme Court of the State of Illinois sought to be reviewed is April 10, 1940 (R. 279).

Statement of the Case.

A full statement of the case is set forth in the accompanying petition for writ of certiorari under the heading "Summary Statement of the Matter Involved" (*Supra*, pp. 1-4), which statement together with the following additional facts, is adopted as the statement of the case in this brief in support of the petition for certiorari.

Sidney Adler was a lawyer of the Chicago Bar who started with a modest income in 1895 and had prospered and grown with the years. In 1922 he had a professional income of $34,000.00 and other income of $16,000.00 (Abs.

132) and was worth approximately a half million dollars (Abs. 113). In 1920 the parties owned jointly a home valued at $50,000.00 (Abs. 138). They separated and Sara Adler conveyed to Sidney Adler her half interest in the home. Adler then created the 1920 trust to pay Sara Adler $5400.00 for her life, reserving to himself the remainder. Two years passed, the then statutory desertion period, and Adler filed suit for divorce. Negotiations were opened by Adler for a property settlement which he successfully arranged prior to the divorce hearing. Adler so told the court (Abs. 4). The court then entered instanter a decree of divorce against Sara Adler for her desertion, reserving for further consideration the question of alimony.

On December 1, 1922, the following day, the parties signed the Supplemental Trust papers which were presented to the court the following day, December 2, 1922, together with a consent decree signed by Sidney Adler and Sara Adler and also by their respective counsel, which was signed by the judge and entered of record instanter.

After his divorce Adler conveyed the trust property to his sons subject to his life estate.

In 1923 Sidney Adler remarried and on December 31, 1924, conveyed the excess income in the trust property to his second wife during their joint lives and as long as they lived together by a document reciting that he had "deeded a life estate for and during the natural life of Sara Adler, his former wife to * * * trustees with powers and duties among other things of paying $10,000.00 of the annual income thereof to said Sara Adler, for and during her natural life * * *." This conveyance states that upon the death of Sara Adler her "annuity of $10,000.00 shall revert" to Sidney Adler (Abs. 95-96).

The supplemental trust is built upon the shoulders of the first trust and appropriates the next $4,600.00 of the yearly income therefrom. That it was intended to be a full

and final settlement between the parties is loudly spoken and echoed and re-echoed by the record. It settles for all rights including alimony; it pays for all rights including alimony and it releases all rights including alimony (Abst. 27-28) and is a contract, between persons who are no longer occupying the marriage relation, as it states, between "Sidney Adler and Sara Adler formerly husband and wife but now divorced from each other by decree" entered November 29, 1922 (Abst. 17). That the agreements and decree completely settle all alimony and other marital rights of Sara Adler, at least in contractual form is admitted, but it is contended by Sidney Adler that, even so intended, the contracts merged in the decree they having called it by the name of "alimony", they had no power to contract against the statutory jurisdiction of the courts to modify alimony payments as circumstances of the parties might change.

The property agreements confirmed by the decree were contained in two sets of instruments. *First:* On December 30, 1920 (two years prior to the divorce decree) property was conveyed to three trustees in trust thereby creating "a life estate for and during the life of the said Sara Adler" and the trustees "to have and to hold the above described property for the life of said Sara Adler upon the following uses and trusts," etc. This trust provided for quarterly payments to Sara Adler of $1350.00. This trust was not disturbed by the order of May 8, 1939, for in the petition to modify the decree, that portion was specifically excepted. *Second:* the day following the decree of divorce the parties entered into a further agreement between themselves and the trustees upon the same considerations as the trust arrangement creating the said life estate "for the purpose of making full and final provision for maintenance and support of Sara Adler and for alimony, dower, and rights of dower, and all claims and property rights, and rights of every kind and nature" of Sara Adler against Sidney Adler,

by which agreement the trustees were directed to pay to Sara Adler the further sum of $1150.00 quarterly during her life which "shall be in full settlement of all her alimony, dower and rights of dower, and all other rights, claims and demands" against Sidney Adler. This second trust provision was voided by the decree of the court by denominating it to be a decree for "alimony", notwithstanding the contracts had released alimony, and stated it to be in full of alimony.

Both sets of agreements contain provisions by which Adler obligates himself to make good any deficiency upon the failure of the trust to produce the payments provided to be paid by trustees.

By its decree the court ratified the documents of December 30, 1920 and those of December 1, 1922 and decreed that

> "Sidney Adler shall well and truly promptly make all the payments of money and shall well and truly keep and perform all and every of the covenants and agreements on his part to be performed in and by the terms of said supplemental Trust Indenture and Supplemental Agreement dated December 1, 1922 and that the payments to said Sara Adler as provided in said last two mentioned instruments and the faithful performance of all other provisions thereof for the benefit of said Sara Adler shall constitute and be received by said Sara Adler as and for her permanent alimony and as a complete and final settlement of all her rights of dower alimony, property, and other rights and claims against said Sidney Adler. No subsequent marriage of said Sara Adler shall affect this decree or any or all of the indentures or agreements in this decree referred to."

On December 26, 1922, an agreement was entered between Sidney and Sara Adler, clarifying and amending the supplemental trust agreement of December 1, 1922 (Abs. 35-36, 9). On the same date a trust indenture conveyance was made

showing the changes (Abs. 37-9). This conveyance was recorded in the recorder's office of Cook County, as were all the trust indentures mentioned, but these two clarifying and amending instruments were not entered in a court decree.

Specification of Errors.

Petitioner assigns the following errors which she intends to urge in the event her petition for a writ of certiorari is allowed:

The Supreme Court of the State of Illinois erred in holding that the contract and trust agreements made between the parties and ratified and approved in the consent decree were merged in the decree as alimony and erred in decreeing their cancellation and abrogation.

The Supreme Court of the State of Illinois erred in holding that the provisions of the consent decree ratifying the supplemental trust agreement merged the contracts and the decree and thereby became a provision for alimony payments and erred in refusing to hold that the supplemental trust agreements were in full of and in lieu of alimony and all marital rights and not alimony.

The Supreme Court of the State of Illinois erred in holding that the provisions of the consent decree in a divorce proceeding giving her an interest in a trust for life regardless of her subsequent remarriage was alimony instead of an irrevocable property right or alimony in gross under the laws of Illinois.

The Supreme Court of the State of Illinois erred in holding that a consent decree in a divorce proceeding embodying the terms of a contract wherein the decree specifically states "no subsequent marriage of said Sara Adler shall affect this decree or any or all of the Indentures or Agreements in this decree referred to," can be modified on the ground of remarriage.

The Supreme Court of the State of Illinois erred in holding that a consent decree of divorce ratifying and approving a valid contract between the parties and decreeing that it shall be received by her "as and for her permanent alimony and as a complete and final settlement of all her rights of dower, alimony, property and other rights and claims against said Sidney Adler," may be modified by the court.

The Supreme Court of the State of Illinois erred in applying a statute enacted in 1933 to a decree entered December 2, 1922 whereby alimony was cancelled and abrogated on the basis of the enactment of 1933 and erred in applying it at all.

The court erred in destroying the trust as distinguished from modifying payments due under the personal liability of Sidney Adler in case of deficiency in the trust revenues.

ARGUMENT.

The trust agreements and the decree ratifying them create a vested property interest in the real estate placed in trust and the rents and profits and issues thereof, which the decision of the court destroys.

That the trust agreements and trust indentures, to all of which the trustees are parties, were distinctly property settlements, having none of the characteristics of alimony, is evidenced in many ways in this record as we now show.

To begin with the suit is by the husband, not the wife. It may be conceded as true as stated in the opinion of the Supreme Court of Illinois, that cases can be conceived of where, in equity, an erring wife might, under the Illinois Statute as it then existed, be allowed alimony to keep her from becoming a charge upon society, etc.; but this is not that type of a case. The original trust of December 30, 1920 was then in existence producing $5,400.00 per year for Mrs. Adler. Adler was a wealthy man. So there was no condi-

tion before the court warranting the exercise of this extraordinary jurisdiction and of course the allowance to Sara Adler did not proceed upon that ground. That thought was in no one's mind.

Then there were no pleadings raising the question of an allowance of alimony, or of a property settlement. No fight was being waged for it. The complaint alleged only the jurisdictional facts and claimed a divorce for desertion. The answer of Sara Adler denied the desertion and asked that the complaint be dismissed. That was the extent of the pleadings (Abs. 1-2).

The suggestion of alimony first appears in the statement of Sidney Adler on the witness stand when he told the trial judge that he had established a trust for his wife's support and maintenance, and then volunteered to do anything fair as to alimony, suggesting that his wife had conveyed to him her interest in their home, that an agreement had been reached, and said that that fact was taken into consideration in the agreement (Abs. 3-4).

It was on those statements that the court, in entering the divorce decree, which he did instanter, reserved the question of alimony for "further consideration."

Two days after the decree of divorce was entered the four documents creating the original trust, and the supplements thereto, were presented to the court with a consent decree, signed by the parties, which was entered and which recites the trust of December 30, 1920, and states that that trust, producing $5,400.00 yearly, should not be affected by the decree; and then states that the court is advised that an agreement has been reached to pay Sara Adler.

> "* * * $1150.00 quarter yearly for her life making $2500.00 quarter yearly and that this amount has been secured to said Sara Adler by a certain supplemental trust agreement bearing date the first day of December, A. D. 1922 * * * and that the increased

payments * * * were intended to be and are *in full of all claims* and rights of dower, *alimony,* property and other rights and claims which the said Sara Adler now has or may hereafter have against said Sidney Adler, and that Sara Adler is willing to accept the same *in full of* such claims and rights of dower, *alimony* and property and other rights and claims, excepting always her rights under said indenture, and trust agreement dated December 30, 1920. * * * And * * * the payments provided to be made to Sara Adler are to continue even though the said Sara Adler should hereafter remarry. And * * * upon consent of the parties * * * evidenced by their respective signatures attached hereto:

It is ordered, adjudged and decreed that said supplemental trust indenture and supplemental trust agreement are hereby in all things confirmed * * *."

The decree then provides that Sidney Adler shall make the payments and perform the covenants of those agreements and that

"* * * the payments to said Sara Adler as provided in the last two mentioned instruments and the faithful performance of all other provisions *thereof for the benefit of Sara Adler* shall constitute and be received by said Sara Adler as and for her *permanent alimony and as a complete and final settlement of all* her *rights* of dower, *alimony,* property, and other rights and claims against Sidney Adler. No subsequent marriage of said Sara Adler shall affect this decree or any or all of the indentures or agreements in this decree referred to

"Enter: GEORGE FRED RUSH.

"We consent to the entry of the above and foregoing decree.

"SIDNEY ADLER.
"SARA ADLER."

The provisions of this decree are as well the representations and stipulations of fact forming their contract settlement in full as they are the decree of the court. The judicial mind did not have to be exercised.

Thus it is seen that this is purely a settlement in full by Sara Adler of all claims, including alimony; "as a complete and final settlement of all her rights of dower, alimony," etc. It was a settlement in full and a satisfaction of record of any personal obligation of support or maintenance owed then or ever owed by Sidney Adler. It was arranged for prior to the divorce when contests might have been judicially waged and then taken to the court after the divorce decree had been entered. It was clearly intended to shift any personal obligation to support from Sidney Adler upon the trust property.

It is to be noted that the decree does not purport to order Sidney Adler to personally make the payments provided for in the trusts; the trustees were to do that; the only requirement was that Sidney Adler should make the payments provided for in the agreements for him to make and those were to make up any deficiency in the quarterly installments that might occur; which is purely a secondary obligation. The relationship created is that of guarantor which is a contractual obligation and has none of the characteristics of alimony.

Then it is to be noted that the conveyance in trust to the trustees made by Sidney Adler and joined in by Sara Adler recites that

> "they do hereby convey and quit-claim unto * * * as grantees, a life estate for and during the lifetime of said Sara Adler * * * to have and to hold the above described property for the life of Sara Adler upon the following uses and trusts, to-wit" (Abs. 13).

Then follows the contractual rights of the parties and active duties of the trustees.

The payments to be made under the supplemental or second trust arrangement are simply added on to the first trust as additional payments of $1150.00 per quarter for the life of Sara Adler. So it remains a life estate with the extent only of her interest increased.

It is to be further noted that the second trust agreement is prefaced with a statement of the new relationship of the parties who were "formerly husband and wife, but now divorced from each other by decree entered * * * on November 29, 1922" (Abs. 17) from which it is clear Sidney Adler was not contracting to take on alimony payments for life; it is equally clear he was seeking to quiet that matter and to be forever discharged of that obligation. In fact, the supplemental trust indenture adding the $1150.00 payments to the charge upon the trust property in addition to the $1350.00 payments specifically says it is in

> "consideration of the relinquishment of alimony, dower and all other claims and demands to which said Sara Adler is now or might hereafter become entitled; * * * the trustees shall pay * * *" (Abs. 19).

Obviously a decree ratifying the relinquishment of alimony is not the awarding of alimony.

Again in the supplemental trust agreement it is recited as a consideration that Sara Adler had conveyed to Sidney Adler 5710 Woodlawn Avenue, Chicago and "did give and yield other good and valuable considerations" for the trust agreements of December 30, 1920 and had thereby expressly retained other claims; and that agreement then states

> "for the purpose of making full and final provision for the maintenance and support of said Sara Adler and for alimony dower and rights of dower, and all claims and property rights, and rights of every kind and nature of second party against first party; * * * and second party (Sara Adler) does hereby forever release and discharge first party (Sidney Adler) from all claims and

> demands which she may have against him except such as are secured to her by the terms of said trust indentures of December 30, 1920, said supplemental Trust Indentures of even date herewith and this supplemental agreement" (Abs. 24-28).

From this it is seen the claim of alimony was released with other claims and all such claims are merged in the trust and disappear as such. Nothing was left for the court to pass upon except the agreement which satisfied all claims including alimony; so instead of decreeing alimony, the court satisfied all claims of alimony with other claims.

Obviously if Sara Adler released her rights to alimony the court did not decree any to her but only decree to her the price for the release of alimony.

Again we find a provision that the trustees are to make the payments

> "direct to Sara Adler and not upon any assignment written or oral and the same shall not be subject to garnishment or any other proceeding on the part of any creditor" (Abs. 20).

which has the earmarks of a spendthrift trust and fits the provisions of Section 49 of Chapter 22, Illinois Revised Statutes which provides that creditors may not reach a trust fund "when such trust has in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself."

This provision definitely stamps the payments as trust payments and not alimony payments and confesses the trust nature of the payments.

Also there is the provision for a lien upon the trust property to secure the payments and the right to foreclose that lien; and the provision for a suit at law upon default of payments by the trustees. These are not the characteristics of alimony. They are agreements and stipulations carrying

the rights of Sara Adler into the contractual field and beyond the realm of alimony.

And so it is that the court has permitted Sidney Adler to renege his contract obligations and to now claim that he owes alimony as against his industrious effort to satisfy and discharge that obligation by charging it upon property by deed and contract and having it satisfied of record, because perchance it might be more advantageous to him to reclaim the excess income of the trust over $5,400.00 as his own.

The decision of the trial court and of the Supreme Court clearly destroy the obligations of the contract between the parties solemnly decreed of record and invades and destroys the constitutional rights of Sara Adler.

II.

The obligation to pay alimony is not a debt but a duty of the husband to support his wife. Where by consent of the parties the obligation is enlarged beyond the divorce statute to extend payments for the life of the wife and by its terms become a charge upon his estate, the decree rests upon contract and is not alimony subject to modification.

The decree here did not create that type of alimony which may be modified from time to time;—that obligation, raised by the relationship of husband and wife, charged personally upon the shoulders of the divorced husband which is the equivalent of support and maintenance; an obligation which is not a debt and which will be enforced by the *in personam* processes of equity. That type of alimony which may be modified from time to time is one that is a continuing obligation existing for the *joint lives* of the parties; when it overflows into the husband's estate it cannot be the subject of modification. The Illinois decisions define alimony to be the provision dictated by the duty of the husband to support his wife so long as they both shall live, or during their

joint lives, as it is expressed (*Stillman* v. *Stillman*, 99 Ill. 196; *Smith* v. *Smith*, 334 Ill. 370, 380; *Herrick* v. *Herrick*, 319 Ill. 146). The type of alimony here created if it is to be denominated alimony is a specific charge and lien upon property and its income to continue for the life of Sara Adler, notwithstanding Sidney Adler might have deceased. That is not alimony that rests upon Sidney Adler's shoulders. For he had shouldered it upon a piece of property dedicated to raising the necessary money during the life of Sara Adler, when he may have deceased. That provision flows from his contract,—not his duty.

The provisions made in this decree are not provisions for alimony because alimony is allowed to the wife in recognition of the husband's duty to support his wife during the joint lives of the two. (Bishop, Marriage and Divorce (6th Ed.) 8 Sec. 42 F; *Lennahan* v. *O'Keefe*, 107 Ill. 626; *Stillman* v. *Stillman*, 99 Ill. 196; *Smith* v. *Smith*, 334 Ill. 370, 380). Liability for support of the wife necessarily ends with the death of the husband. Alimony, therefore, is ended by the death of the husband, an event upon which the obligation to support would have ended had there been no divorce. (*Brandon* v. *Brandon*, 1940 Tenn., 135 S. W. (2nd) 929.)

In this case the wife was to receive the income from the property for her natural life, enforceable after his death as against the property in the trust conveyance, both by the terms of the contract and trust, and the court decree of 1922 (Abs. 5-8). Subsequent marriage on her part was not to affect the decree or the contract or the conveyance as the court itself so ordered (Abs. 8). These are not proper alimony provisions except by the contract and consent of the parties, for "he was under no obligation to make provision for her support and maintenance after her death, if she survived him." *Smith* v. *Smith*, 334 Ill. 370, 380.

A well established test to determine whether a decree is an alimony decree, and therefore subject to modification

by the court in which the decree was entered, is whether the provisions embodied in the decree could have been imposd by the court without the consent and agreement of the parties (*North* v. *North*, 339 Mo. 1126, 100 S. W. (2d) 582; *Dickey* v. *Dickey*, 154 Md. 675, 151 Atl. 387; *Spear* v. *Spear*, 158 Md. 672, 149 Atl. 468; *Moore* v. *Crutchfield*, 136 Va. 20, 116 S. E. 482).

North v. *North*, *supra*, the court said:

> "The provisions in the decree awarding the wife $500.00 per month to continue so long as she remained single and unmarried justifies the conclusion that the decree was an approval of the contract and not an award of alimony, because the court had no authority to make an award of alimony to continue so long as the wife remained single and unmarried, but did have authority to approve the contract between the parties containing that provision."
>
> "The statute which authorizes the court to modify an award of alimony does not authorize the modification of legal contractual obligations which the husband assumes and agrees to pay his wife. So the question in this case is whether or not the $500.00 monthly allowance to the wife is an award of alimony. If it is alimony it is subject to modification; on the other hand, if it is not alimony, but is a legal contractual obligation of the husband, then contract is not subject to modification by the court. A proper determination of that question will settle this case.
>
> "The marital duty of a husband to support his wife is upon him only during his lifetime, therefore, the court cannot compel him to make provision for its continuance after his death. However, a husband may voluntarily, by contract, make provision for support to continue after his death if he sees fit to do so, and the court is authorized to approve such an agreement. The court could not have made the award but for the contract between the parties. Therefore, the decree was an approval of the contractual obligation of the husband to the wife and not an award of alimony in

the sense in which the word alimony is used in the statute."

Barnes v. *Am. Fertilizer Co.*, 1935, 144 Va. 692, 103 S. E. 903, 907.

"It cannot be questioned, however, that although the courts may have no authority in the absence of statute to allot to the wife any part of the husband's real estate as alimony, courts which have jurisdiction to grant divorces and award alimony also have the incidental authority to approve bona fide and valid agreements between the parties for the settlement of property rights and claims for alimony, though they have no jurisdiction in the divorce suit to enforce compliance with such contracts, or to alter their terms. This seems to be the general rule and has been so held in several cases in this State.

"And engrafted upon the rule above referred to is the further doctrine that a decree entered in a divorce suit approving a contract between the parties for the settlement of alimony and property rights is not a decree for alimony."

In *Dickey* v. *Dickey*, 154 Md. 675, the court said that there is no ground for the assumption that the parties who were acting under advice of their counsel, did not know that the continuation of the husband's obligation to pay after his death was an extension of his duty to pay alimony, which ceases at the death of the husband and so this enlargement in point of time of the husband's obligation to pay alimony was doubtlessly reflected in the amount of the agreed weekly payments. If the allowance to the wife in the decree is the result of a previous agreement between the spouses and does not fall within the accepted definition of alimony, so that it would have been impossible for the chancellor to have allowed permanent alimony as the decree provides, then notwithstanding the parties and even the court called it alimony, the allowance in the decree for the

wife was not alimony and a court of equity has no power to modify the decree as in the case of an award of alimony. The agreement by the husband to pay the wife a weekly sum of money until her death did not limit his payments to the joint lives of the spouses and hence was not what the court could have decreed as alimony, but this agreement provided the wife with a weekly stipend without reference to whether the husband survived her or not, was properly incorporated in the decree.

In *Storey* v. *Storey*, 125 Ill. 608, 18 N. E. 309, the husband agreed to pay the wife a sum of $2,000.00 a year for as long as she may be and remain sole and unmarried and this was provided to be binding on his heirs, assigns, etc. It was held in this case that alimony by agreement could extend beyond the husband's life. However, in *Adams* v. *Storey*, 135 Ill. 448, 26 N. E. 682, where the wife above sought dower in her former husband's property, it was held that the alimony paid above for as long as she should live cut off dower rights, because the "allowance made (in *Storey* v. *Storey*) not only furnished her with alimony proper, but with a full and liberal equivalent for dower." The court said that since there was no duty on his part "it must be presumed under the circumstances of the case, that the allowance of $2,000.00 a year for the time intervening the death of her husband and her own death, was in lieu of dower."

Further the decree in this case was not a personal decree, at least, in so far as the trust itself is concerned. The power of the court to refuse enforcement of the personal obligations of a decree as was done in *Herrick* v. *Herrick*, 319 Ill. 146, 149 N. E. 820, where there was a contractual settlement, or the right of the Federal Government to levy a tax on the income of the husband to that extent and for that reason, as in (*Helvering* v. *Fuller*, 1940, 60 Sup. Ct.

784; *Helvering* v. *Leonard*, 1940, 60 Sup. Ct. 780; *Helvering* v. *Fitch*, 1940, 60 Sup. Ct. 427) is not questioned. The court is however, without power to make a new contract and a new conveyance for the parties (*Renick* v. *Renick*, 1933, 247 Ky. 628, 57 S. W. (2d) 663) and go outside the decree itself containing no personal obligation and order the trustees of a trust to pay over the rents and profits to a person other than the beneficiary named therein. The fact that the court approved the agreement of the parties does not make the order of the court a decree for alimony. (*Moore* v. *Crutchfield*, 136 Va. 20, 116 S. E. 482; *Stoutenburg* v. *Stoutenburg*, 285 Mich. 505, 281 N. W. 305). Incorporating the agreement in the decree was made for the obvious purpose of preventing either party from disputing the legality of the agreement. All remedies for the breach of the contract and trust were specifically retained by the terms of the agreement. (Abs. 20-22.)

It was not the intent of the parties that the contract and trust conveyance be merged into a decree for alimony as such. Otherwise it would have been a useless gesture to provide that the payments should run for her life; that the property in trust should be bound after his death; that neither the decree nor the contracts nor the trusts would be affected by her subsequent marriage; that it was a full and final settlement of all right. Furthermore, he treated the trust conveyance as such, as shown by his statements of income, which did not include the trust property (Abs. 15-130).

III.

The retrospective application of the 1933 Statute made by the court, ending the payments held to be alimony because of the remarriage of Sara Adler operates to cut off her vested rights to such alimony, if such payments be alimony.

Assuming for argument's sake that the Supreme Court was right in denominating the trust payments to be "alimony", we make these suggestions to demonstrate that the court has destroyed vested rights by the use of such holding.

There are two provisions of the Illinois Divorce Act pertaining to alimony (Sec. 18, Chap. 40, Ill. Rev. Stat.); it will be useful to differentiate them. The older provision of the law (1874) is:

> "The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance * * * as shall appear reasonable and proper."

Under this act remarriage of a divorced wife has been held by Illinois courts to be no more than such a change in circumstances of the parties as might justify a reduction of alimony.

The amendment of 1933 provided that

> "A party shall not be entitled to alimony and maintenance after remarriage."

The Illinois Supreme Court has now held that this operates on all decrees for alimony in existence when the act became effective in 1933 as well as those entered thereafter.

We point out that there is a wide difference between the power reserved in the divorce court to "make *alteration* in the allowance of alimony" and the prohibition in the 1933

amendment which denies the *right* to any alimony after remarriage.

The Illinois Supreme Court has here given a retrospective application to the Act of 1933 by first holding that the settlement trusts, when ratified by decree of 1922, became merged in the decree and by such merger became a provision for alimony; and then further holding that the Act of 1933 ending alimony upon remarriage, operated to cut off the right to such alimony payments under the decree; thus holding that a right to alimony which was vested by the decree in 1922 had been cut off by the legislative Act of 1933. Prospective payments under alimony decrees are vested rights; those payments may be modified, increased or decreased; but to destroy the *right* to such payments is necessarily the destruction of a vested right.

The Supreme Court of Illinois had this point clearly before it, as it says, in its opinion:

> "The questioned provision of the amendment to Section 18 of the divorce act is the proviso 'that a party shall not be entitled to alimony and maintenance after remarriage.' It is urged that if this clause is given effect, and respondent's rights to alimony taken away by reason of her remarriage, it takes her vested rights contrary to the constitutional guaranties" (R. 231).

The court then disposed of the contention by holding that the trial court did not, in fact, apply the act retrospectively because it made the modification effective as of the date of filing the petition and then held "The amendment of 1933 to Section 18 of the Divorce Act does not affect any vested rights of respondent." But the test stated by the court really does not test the question presented, for while the trial court and the Illinois Supreme Court did not cut off the payments as of the day the act became effective, both courts applied the law to a decree some ten years old at the

time of the passage of the Act, by destroying the *rights* to alimony provided for in that decree.

The power possessed by the Illinois courts at the time the decree was entered in 1922 over alimony payments upon remarriage of a divorced wife, was only to *modify* the provisions as to alimony,—not to destroy the rights thereto decreed; to make "alterations in the allowance of alimony," not to change the right thereto established by the decree.

It is therefore, respectfully suggested that if it be conceded as held by the Supreme Court of Illinois that the decretal provisions were alimony payments, and not a property settlement, and the opinion of the Supreme Court of Illinois is to stand as rendered upon that point, its decision operates to prevent Sara Adler from hereafter applying for an increased allowance upon and adverse change in her fortunes, or a fortuitous change in those of Sidney Adler under the other provision of the statute; for by the decision of the Illinois Supreme Court the supplemental trust is abrogated, annulled, destroyed and wholly lost to Sara Adler, and this notwithstanding the considerations and agreements of the parties upon which those trusts are based. But it is urged that that power the court did not have over decrees antedating the Act of 1933.

This very possibility of remarriage was visioned by the parties and was specified in the trusts and in the decree to be permissable and no cause for abating the payments to be made by the trustees under the trusts. The effect of that agreement was that remarriage should not automatically abate the payments provided in the trust, nor be considered as a cause for abating the payments.

It was not then, in 1922, and it is not now, unlawful nor against public policy in Illinois for a divorced husband to pay alimony to his divorced wife after her remarriage. The decisions have been, in Illinois, prior to this Act of 1933, that remarriage of a divorced wife did not *ipso facto* stop

alimony although it was always recognized as a cause for *modification* of alimony payments upon application of the husband; so that it is obvious that the Act of 1933 only could become an actual part of decrees thereafter entered and could automatically become a part of decrees then in existence.

Moreover, in no case involving modification of alimony payments in remarriage cases has the Illinois courts ever dealt retrospectively with the payments when making modifications on that ground. In the case of *Stillman* v. *Stillman,* 99 Ill. 196, the divorce court not only refused to abate the payments as of the date of the remarriage, but modified, reduced and continued the payments at $1.00 per year thereafter; and that order was affirmed.

The opinion of the Supreme Court of Illinois in this case cites the *Stillman* v. *Stillman* case as authoritative and states the former rule as to the affect upon alimony by remarriage to be

> "That remarriage of a woman who was receiving alimony from her former husband was such a change of condition as to authorize a modification of the decree to the extent of cancelling the alimony payments, Stillman *v.* Stillman, 99 Ill. 196; McGinnis *v.* McGinnis, 323 Ill. 113). The amendment merely adopted the general rule and made it mandatory upon the court to cancel alimony payments in all cases where the recipient had remarried."

But it is seen that the court erred in its conclusion that the amendment "made it mandatory upon the court to cancel alimony payments in all cases where the recipient had remarried," and further erred in holding that

> "Either the remarriage of the respondent or the material impairment of the estate and income of petitioner required a cancellation of all payments of alimony maturing after the filing of the petition" (R. 232).

These holdings are definite decisions that the Act of 1933 is operative upon all such type of alimony decrees then existing.

Thus, as this case now stands, it is *res adjudicata and conclusive* between the parties that all payments under the decree of 1922 and the trust upon which that decree rests are abrogated; and the rights of Sara Adler under the decree of December 2, 1922, and the trust agreement of December 1, 1922, are forever cut off by that decision in violation of her constitutional right securing her vested interests.

The net result of the decision of the Supreme Court of Illinois is that the contracts and the decree in question merely set up a system by which alimony payments were to be made; and if that holding is permitted to stand, then that decision will operate to cut off the vested alimony rights of Sara Adler, and all others holding like decrees, and be obnoxious to the constitutional prohibitions specified.

The right reserved to change alimony payments as fortunes change, as that power existed in 1922, is a right reserved to courts to change, *to modify,*—not to destroy. The right given to the courts by the Act of 1933 is to end, *destroy,* terminate. One act is based upon the continuing right to alimony while the other withdraws that right.

It is obvious that both provisions of the statute cannot apply here,—one to *modify* the payments, and the other to cut off the *right* to such payments.

It is not impossible, nor even improbable that upon an upswing of business and values Sidney Adler's fortunes may reach the peak of his former prosperity; nor that the future may bring days of adversity to Sara Adler; and so if the decision stands that the decree awarded alimony rather than having ratified a contract, it nevertheless violates constitutional rights. Whether that right is denominated, decretal or contractual it is violated.

The retroactive application of the Act of 1933 to the decree of 1922 thus destroys a vested right and gives this court the jurisdiction to grant the writ of certiorari, to correct the error.

Respectfully submitted,

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LEO O. MCCABE,
HARRY ABRAHAMS,
Of Counsel.

(8784)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 223

SARA ADLER (now Sara Cowley-Brown),
Petitioner,

vs.

SIDNEY ADLER,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ODE L. RANKIN,
Counsel for Petitioner.

LEO O. MCCABE,
HARRY ABRAHAMS,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO

Summary of Reply Argument.

I. and II.

PAGE

The petitioner's contention is not that the decision of the State Court was merely an erroneous one, but that the court lacked jurisdiction and power under the laws of the State of Illinois to abrogate the contract and the trust indenture in question and thereby violated the due process clause of the State Constitution (Art. II, Sec. 2) and in turn violated the due process clause of the Federal Constitution applicable to the State (Amend. 14, Sec. 1) 3-5

III.

A Federal question is raised in this case by construing the Act of 1933 which amended Sec. 18 of the Illinois Divorce Act, by providing that alimony shall not be allowed on remarriage, as applicable retroactively to a consent decree entered in 1922, thereby denying due process of law and impairing the obligation of contract under the State and Federal Constitutions .. 6-7

A Federal question is raised since the State matters ruled upon, such as changed financial condition and remarriage, will not adequately and independently sustain the decision of the State Supreme Court, and the petitioner is vitally affected by the application of the Act of 1933 7-9

Table of Cases.

Statutes.

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REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

REPLY TO RESPONDENT'S STATEMENT OF CASE.

The petitioner wishes to call attention to a misstatement in respondent's statement of the case on P. 2 wherein the estate conveyed to Sara Adler by Sidney Adler under the trust indenture of December 30, 1920, is referred to as an *estate pur autre vie.* The estate conveyed by Sidney Adler in both the trust indenture of December 30, 1920, and the trust indenture of December 1, 1922, was *an estate for her life and not for his.* An estate *pur autre vie* would be an estate for his (grantor's) life. (Bouvier's Law Dictionary, Rawles, 3rd Edition, defining Estate for Life.)

The trust indenture of December 30, 1920 (R. 12-17) was a conveyance to the trustees, as grantees, of *"a life estate for and during the lifetime of the said Sara Adler"* (R. 13). This interest is specifically referred to as a life estate in many instruments signed by Sidney Adler, as follows: Trust Agreement of December 30, 1920 (R. 56-62 at 56); Conveyance of December 26, 1922 (R. 202-203, at 203); Supplemental Trust Indenture of December 1, 1922 (R. 17-24 at 17, 18); and Supplemental Agreement of December 1, 1922 (R. 24-35 at 25).

In the Supplemental Trust Indenture of December 1, 1922, the conveyance is also for her life. It is provided that "the said trustees shall pay to the said Sara Adler, out of the net income of said property, in addition to the sum of Thirteen Hundred and Fifty Dollars ($1350.00) already secured to her by said Trust Indenture of December 30, 1920, the further sum of Eleven Hundred and Fifty Dollars ($1150.00) per quarter, *making in all the sum of Twenty-five Hundred Dollars ($2500.00) quarterly for and during her natural life.*" (R. 19, 20.)

The total payment of $2500.00 a quarter from both trust indentures was to be paid for the *natural life of Sara Adler from the trust.* His obligation to make up any *deficiency* ceased upon his death as to the $1150.00 quarterly payments. (R. 29.)

In the divorce decree of December 2, 1922, it is stated, "The court is further advised by counsel and doth find that an agreement has been reached by the parties hereto to pay to said Sara Adler *the additional sum of Eleven Hundred Fifty Dollars ($1150.00) quarter yearly for her life,* making in all Twenty-five Hundred Dollars quarter yearly * * *" (R. 6).

On Page 4 of respondent's brief, the income of the respondent is placed at less than $15,000.00 a year and prop-

erty valuation at $225,000.00. This is not an adequate statement of the matter since many items, such as capital gains (R. 116-130), free rent (R. 141), and income from the trust property to either his second wife (R. 140) and income therefrom for the benefit of Sara Adler, are not included. Neither is the trust property included in the valuation. (Summarized R. 266-270.)

REPLY TO RESPONDENT'S ARGUMENTS I AND II.

The petitioner's contention is not that the decision of the State Court was merely an erroneous one, but that the Court lacked jurisdiction and power under the laws of the State of Illinois to abrogate the contract and the trust indenture in question. The State Court in exercising this power in the case violated the due process clause of the State Constitution (Art. II, Sec. 2) and in turn violated the due process clause of the Federal Constitution applicable to the States (Amend. 14, Sec 1).

The prohibition of the 14th Amendment of the Federal Constitution extends to all acts of the State, whether acting through its legislative, its executive, or its judicial authorities. Judicial proceedings are governed by the requirement of due process of law and are subject to that restriction in Art. II, Sec. 2 of the State Constitution and Sec. 1 of the 14th Amendment to the U. S. Constitution.

People v. *Belcastro,* 356 Ill. 144.
Scott v. *McNeal,* 154 U. S. 34.
Virginia v. *Rives,* 100 U. S. 313, 318.

No judgment of a court is due process of law if rendered without jurisdiction in the court. Due process of law means a course of legal proceedings according to the rules established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by

its constitution and laws to pass upon the subject matter of the suit.

Scott v. *McNeal,* 154 U. S. 34.

Thirty days after the decree of divorce has been entered, the court loses all jurisdiction to change its decree, except as to the power reserved under Sec. 18 of the Divorce Act, whereby the court may *modify decrees of alimony,* but such court has no jurisdiction of the subject matter of a valid independent contract, or of a valid irrevocable and completely executed trust.

Smith v. *Johnson,* 321 Ill. 134.
Kelley v. *Kelley,* 317 Ill. 104.
Smith v. *Smith,* 334 Ill. 370.
Keene v. *Keene,* 241 Ill. App. 414.
Ill. Rev. Stat. (1939) Ch. 110, Sec. 174, Par. 7.

The trust indentures and contracts were carefully drawn and their validity is not questioned. These contracts constitute property rights. The court cannot make a new contract for the parties, nor provide for new provisions governing the trustees.

Chicago Title & Trust v. *Robin,* 361 Ill. 261.

The decree entered in 1922 was simply an approval of the terms of a contract settling all property rights including alimony, and in lieu of alimony (R. 5-8). In Illinois a property settlement may be made and an allowance in gross given which is a full discharge of all obligations of the marriage between the parties, and may not be modified by the court under Sec. 18 of the Divorce Act.

Plaster v. *Plaster,* 47 Ill. 290, 294.
McKey v. *Willett,* 248 Ill. App. 602.

Furthermore, the trust conveyance was completely executed and became an irrevocable conveyance as between the parties thereto (*Ehlers* v. *Ehlers,* 259 Ill. App. 142, 148).

Even past due alimony is a vested debt, and that which is paid is a debt discharged and cannot be modified or set aside by the courts of the State of Illinois.

Craig v. *Craig,* 163 Ill. 176.

Helkelkia v. *Sonzinski,* 223 Ill. App. 30.

The respondent on Page 8 of his brief erroneously states that the cases cited by the petitioner are from states where there was no statute in force at the time of the entry of the respective alimony decrees which permitted the court to modify the alimony payments because of changed conditions.

The very point in issue in the cases cited by the petitioner was whether a statute of the state permitting modification of alimony decrees for changed circumstances applied to a decree which embodied contract provisions such as exist in the *Adler* case, and which could not have been entered except by consent (*Pryor* v. *Pryor,* 88 Ark. 302, 308). In fact, one of the cases cited in the petition, that is, *North* v. *North,* 339 Mo. 1226, the Supreme Court of Missouri not only refused to apply such a statute to the contract provisions but expressly holds in error the Missouri Appellate Court case of *Hayes* v. *Hayes,* 75 S. W. (2) 614, cited by the respondent in his brief. The *Hayes* case did apply a similar statute and for that reason was held erroneous.

REPLY TO RESPONDENT'S ARGUMENT III

It is contended by opposing counsel that no Federal question is raised in this cause.

We point out, however, that a Federal question is raised where the Supreme Court of the state so construes a statute of that state that the provisions of the statute, plus the construction given it, operate to destroy a right guaranteed to the citizen by the Federal constitution.

Baccus v. *Louisiana,* 232 U. S. 334.

Ward & Gow v. *Krinsky,* 259 U. S. 503, 510.

By construing the statute of 1933 to apply retrospectively to decrees in existence at the date of passage so as to *cancel* rights fixed by a consent decree and discharge the obligation thereunder a Federal question is squarely raised. The application of a statute passed in 1933 to a contract or a decree entered in 1922 is clearly retroactive and in violation of Art. II, Sec. 14 of the State Constitution and Art. I, Sec. 10 of the Federal Constitution on impairing the obligation of contract; and Art. II, Sec. 2 of the State Constitution and Sec. 1, Amend. 14 of the Federal Constitution on due process.

Fuller v. *Fuller,* 49 R. I. 45, 139 Atl. 662.

Livingston v. *Livingston,* 173 N. Y. 377, 66 N. E. 123 (cited with approval in *Sistare* v. *Sistare,* 218 U. S. 1, at p. 24).

Blethen v. *Blethen,* 177 Wash. 431, 32 Pac. (2nd) 543.

Legislation that makes material alterations in the character, terms or legal effect of the existing contract is void. Since the court cannot modify prospective alimony in the absence of a reservation of that right either by the court or by a statute existing at the time of the decree, then it

may not modify prospective alimony under the terms of an amendment to the statute, but only under the terms of a statute existing at the time of the decree.

Goodsell v. *Goodsell,* 82 App. Div. 65, 81 N. Y. S. 806. (Cited with approval in *Sistare* v. *Sistare,* 218 U. S. 1, at pp. 24, 25.)

Kelley v. *Kelley,* 317 Ill. 104, 108.

The State Courts applied the Act of 1933 retroactively in the following manner. The Master in Chancery, whose report was affirmed by the trial court and the Supreme Court, said:

> "The language of the statute as amended is very definite and makes no exception, and in the opinion of the Master the situation of the parties involved in this proceeding comes clearly within the language of the amendment." (R. 75.)

The Supreme Court ruled:

> "Her rights became fixed as to accrued payments, but as to all payments maturing in the future she had no vested right. The trial court did not undertake to give the statute a retroactive effect for the decree made the modification effective as of the date of the filing of the petition. The amendment of 1933 to Section 18 of the Divorce Act does not affect any vested rights of respondent" (R. 232).

The decision of the State Court cannot be adequately and independently upheld without application of the Federal question, that is, the application of the Act of 1933. The State Supreme Court said:

> "The questioned provision of the amendment of Section 18 of the Divorce Act is the proviso 'that a party shall not be entitled to alimony and maintenance after remarriage.' It is urged that if this clause is given effect, and respondent's right to alimony taken away by reason of her remarriage, it takes from her vested rights contrary to the constitutional guarantees" (R. 231).

> "Prior to the amendment the general rule adopted by the courts was, that remarriage of a woman, who was receiving alimony from her former husband was such a change of condition as to *authorize* a modification of the decree to the extent of canceling the alimony payments. * * * The amendment merely adopted the general rule and made it *mandatory* upon the court to cancel alimony payments in all cases where the recipient had remarried, regardless of whether or not there had been a change in the financial condition of the former husband" (R. 231-232). (Italics added.)

The decision of the State Court makes cancellation of alimony *mandatory* on remarriage *regardless of the financial changes* of either party. Hence, the Divorce Court would now have no power to modify the award so as to again allow payments to the petitioner, Sara Adler. Before the statute of 1933 and this decision, the Divorce Court could at some future time on petition of Sara Adler modify the award here taken away on a showing of changed circumstances regardless of her remarriage. Since now the State Court under the rule of *res adjudicata* would have no such discretion, it becomes incumbent on this court to decide *"whether the judgment of the state is founded upon or in any manner gives the slightest effect to the subsequent act"* (*Bacon* v. *Texas,* 163 U. S. 207, 218). (Italics added.)

It is stated in *Abie State Bank* v. *Bryan,* 282 U. S. 765 at 773:

> "But the federal ground being present, *it is incumbent* upon this court, when it is urged that the decision of the State Court rests upon a non-federal ground, *to ascertain for itself,* in order that the constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground *independently and adequately* supports the judgment." (Italics added.)

And again on the same page:

> "Where the non-federal ground is so interwoven with the other as not to be an independent matter, *or is*

not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." (Italics added.)

The decision of the State Court gives weight to the enactment of 1933 because it *compels destruction* of respondent's *obligation* on account of petitioner's remarriage, and is *res ajudicata* of any future petition for modification by her on account of changed financial conditions. This decision, therefore, cannot rest upon changed financial condition alone, or on the ground of remarriage under the old Act.

To permit the decision of the Illinois Court to rest upon those grounds alone is to ignore and thereby in effect affirm the decision of the Illinois Court that the Act of 1933 does apply retrospectively to all prior decrees thus allowing the destruction of rights vested in Sara Adler under the decree of 1922.

To save those vested rights this court should take jurisdiction to review the decision of the Illinois Supreme Court.

Respectfully submitted,

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LEO O. MCCABE,
HARRY ABRAHAMS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 223

SARA ADLER (NOW SARA COWLEY-BROWN),
Petitioner,

vs.

SIDNEY ADLER,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

FLOYD E. THOMPSON,
Attorney for Respondent.

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SUMMARY OF ARGUMENT.

Table of Cases.

Statutes.

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ANSWER.

Respondent, Sidney Adler, prays that the petition for writ of certiorari to review the judgment of the Supreme Court of the State of Illinois, entered in the above entitled cause, be denied on the ground that this Court does not have jurisdiction as well as on the ground that the case is correctly decided.

BRIEF IN OPPOSITION TO PETITION.

STATEMENT OF THE CASE.

The statement of petitioner, Sara Adler (now Sara Cowley-Brown) is inadequate to present the issues and respondent, Sidney Adler, feels that it will be helpful to the Court to briefly state the facts.

Petitioner and respondent were married September 24, 1895, and petitioner deserted respondent prior to July 1, 1920. (R. 3-4.) On December 30, 1920, a trust indenture (R. 12-17) and a trust agreement (R. 56-61) were executed. The indenture provided that an estate *pur autre vie* be given to three named trustees with provision for payment from income of such estate of $5,400 a year to petitioner and the balance to respondent. (A. 14.) The agreement provided that the $5,400 to be paid to petitioner was adequate for her support and maintenance (R. 57) but reserved the right to her to demand alimony in case respondent obtained a divorce from her. (R. 58.) The agreement further provided that the property was in full for all rights of petitioner in the estate of respondent except such rights as she might be entitled to have as his widow after his death or whatever rights she might have as a beneficiary under any insurance policy on his life. (R. 59.) Respondent personally guaranteed the payments provided in the indenture. (R. 60.)

On November 29, 1922, the Circuit Court of Cook County, Illinois, granted respondent a divorce from petitioner for her wilful desertion. (R. 1-5.) The decree specifically provided that the question of alimony was reserved. (R. 5.)

On December 1, 1922, the parties executed a supplemental trust indenture (R. 17-24) and supplemental agreement. (R. 24-35.) This supplemental indenture provided that petitioner was to receive an additional $4,600 a year and that the first trust indenture should extend to and secure said additional payments. (R. 18-19.) The supplemental indenture carefully separated the payments of $5,400 and $4,600. (R. 19-21.) The supplemental agreement provided that the additional payments of $4,600 a year should be in full settlement of all alimony. (R. 27.) Article Third provided that the $5,400 and the $4,600 "shall at all times be treated as distinct and independent obligations and charges upon the property hereinbefore described, and that the termination, for any reason, of the obligation to pay the additional sum ($4,600) * * * shall in no wise and under no circumstances affect or terminate the rights of said Sara Adler to receive" the $5,400 annual payment provided by the first trust indenture. (R. 28.) Respondent covenanted to pay any deficiency in the income from the trust property below the sums provided for petitioner so long as he lived. (R. 29.) Only the obligation to pay any deficiency in the $5,400 annual payments was to continue after the death of respondent and be a charge upon his estate. (R. 29.) The agreement carefully separated in every clause the two payments. (R. 25-33.)

On December 2, 1922, the Circuit Court entered a decree reciting the reservation of jurisdiction concerning alimony in the decree of November 29, 1922, and exempting from the effect of the decree the documents of December 30, 1920, and found that an agreement had been reached to pay petitioner the additional sum of $4,600 for life and that this amount had been secured by supplemental documents. (R. 5-6.) It was further decreed that the provisions of the supplemental documents were to be accepted by petitioner in full for all claims for alimony. (R. 6-7.)

The Court decreed that the supplemental documents be confirmed and that respondent make all the payments therein provided and that petitioner receive as and for her permanent alimony the $4,600 agreed to be paid by respondent. (R. 7.)

At the time of the entry of the decree of divorce respondent had a personal fortune of about $450,000 (R. 111) and an annual income of about $45,000. (R. 116.) Petitioner had nothing except her annuity of $5,400. (R. 84.)

In 1924 petitioner married John Cowley-Brown. (R. 78.) They are now married.

On May 22, 1936, respondent filed a petition in the Circuit Court praying for modification of the alimony decree entered December 2, 1922, on the following grounds: 1. A statute passed July 13, 1933, terminating alimony upon remarriage of a divorced wife; 2. The remarriage of petitioner regardless of the statute; and 3. The change in the financial condition of the respondent. (R. 8-17.)

At the time of filing this petition in 1936 respondent's estate had shrunk to half of its value in 1922 and was worth not to exceed $225,000. (R. 113-114.) His income in 1936 had shrunk to one-third of his income in 1922 and had been less than $15,000 in each of the years since 1930 except 1932. (R. 125-130.) At the time of the filing of said petition, petitioner was enjoying the assured income of $5,400 a year coming to her by virtue of the settlement of December 30, 1920, and the $4,600 a year alimony, as well as an independent inheritance from her mother and her brother which had a value of about $30,000 and which produced an income of about $600 a year. (R. 193-197.)

The master in chancery found that the $4,600 additional annual payment was alimony (R. 73), and that the petition for modification of the alimony decree should be al-

lowed because of the remarriage of Sara Adler and because of the changed financial condition of Sidney Adler. (R. 74-77.) The report of the master was confirmed by the Circuit Court and the alimony decree was modified in accordance with the petition and Sidney Adler was discharged from the payment of the $4,600 a year alimony from the date of the filing of the petition. (R. 216.) This decree was affirmed by the Illinois Supreme Court (R. 222-232), the Court concluding that "either the remarriage of respondent [Sara Adler], or the material impairment of the estate and income of petitioner [Sidney Adler], required a cancellation of all payments of alimony maturing after the date of the filing of the petition." (R. 232.)

ARGUMENT.

I.

The first point of argument of petitioner is that "the trust agreements and the decree ratifying them create a vested property interest in the real estate placed in trust and the rents and profits and issues thereof, which the decision of the court destroys."

Clearly this does not present a Federal question. While it is not stated in this point of the argument just what provision of the Federal Constitution is invoked, we assume that the point is that petitioner was deprived of her property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The decree was entered in a regular judicial proceeding in which petitioner appeared in person and by counsel, and it is not shown in what respect there was a denial of due process. We submit that the decision of the Illinois Supreme Court was in all respects in accordance with sound principles of law, but if its decision was wrong there was no denial of due process of law. The Constitution of the United States does not guarantee that the decisions of State courts shall be free from error.

Neblett v. *Carpenter*, 305 U. S. 297, 302.
Great Northern Ry. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364.
Central Land Co. v. *Laidley*, 159 U. S. 103, 112.

It may be that petitioner is here invoking Section 10 of Article I of the Constitution of the United States which prohibits a State from passing any law impairing the ob-

ligation of a contract. But this constitutional provision applies to legislative action and not judicial action. This Court has no jurisdiction to review a decision of a State court merely because the case involves a contract or on the ground merely that the obligation of a contract has been impaired. It must be some legislative act of the State which the State court has applied to impair the obligation of the contract before a case for this Court arises under this provision of the Constitution.

Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 451.
Central Land Co. v. *Laidley*, 159 U. S. 103, 109.
New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30.

II.

The argument under this point is merely that the Supreme Court of Illinois was in error when it held that the additional payment of $4,600 a year, provided by the supplemental documents and incorporated in the decree, was alimony and that other State courts have rendered decisions in conflict with the decision of the Illinois Supreme Court in this case. This does not present a Federal question. It is not within the jurisdiction of this Court to supervise the decisions of the highest courts of the several States in order to bring about uniformity in cases applying local law in the determination of non-Federal questions. However desirable it might be to have all State court decisions uniform and consistent, the Federal Constitution does not require that State court pronouncements shall be either uniform or consistent or correct.

Worcester County Trust Co. v. *Riley*, 302 U. S. 292, 299.
Milwaukee Electric Railway & Light Co. v. *Wisconsin*, 252 U. S. 100, 106.

This Court is limited to a review of so-called Federal questions and to the correction of errors relating solely to Federal law.

Murdock v. *Memphis,* 20 Wall. (87 U. S.) 590, 627.

Whatever the rule elsewhere, it is well established in Illinois that a court of chancery has, by virtue of the provisions of Section 18 of the Divorce Act, the power to modify the provision for the maintenance of the wife made in a trust agreement and thereafter by consent of the parties incorporated in the decree as provision for alimony.

Herrick v. *Herrick,* 319 Ill. 146.
Joachim v. *Joachim,* 267 Ill. App. 237.
Plotke v. *Plotke,* 177 Ill. App. 344.

While we do not consider it important to a determination of petitioner's right to a review by this Court, we call attention to the fact that the decision of the Illinois Supreme Court is in line with the great weight of authority.

Reynolds v. *Reynolds,* 53 R. I. 326, 166 Atl. 686.
Warren v. *Warren,* 116 Minn. 458, 133 N. W. 1009.
Wilson v. *Caswell,* 272 Mass. 297, 172 N. E. 251.
Eddy v. *Eddy,* 264 Mich. 328, 249 N. W. 868.
Hayes v. *Hayes* (Mo.), 75 S. W. (2nd) 614.

The cases cited by petitioner are from States where there was no statute in force at the time of the entry of the respective alimony decrees which permitted the Court to modify the alimony payments because of changed conditions. The provision of Section 18 of the Illinois Divorce Act giving the Court the power from time to time to make such changes in the allowance of alimony as

might appear reasonable and proper, was in effect when the instant decree was entered December 2, 1922 (Ill. Stat. 1921, Chap. 40, Par. 19), and had been in effect in Illinois for nearly a century. Ill. Rev. Stat. 1845, Chap. 33, Sec. 6.

III.

Under this division of her argument petitioner states that "the retrospective application of the 1933 Statute made by the court, ending the payments held to be alimony because of the remarriage of Sara Adler, operates to cut off her vested rights to such alimony, if such payments be alimony."

The Illinois Supreme Court did not rely upon the act of July 13, 1933, which amended Section 18 of the Illinois Divorce Act by providing "that a party shall not be entitled to alimony and maintenance after remarriage," in modifying the alimony decree of December 2, 1922. It decided the case under the long established authority of courts of chancery to make such changes with respect to the allowance of alimony from time to time as shall appear reasonable and proper. The Illinois Supreme Court in its opinion points out (R. 231) that it has long been the rule in Illinois that remarriage of a woman who was receiving alimony from her former husband was such a change in condition as to authorize modification of the decree to the extent of cancelling the alimony payments, citing *Stillman* v. *Stillman*, 99 Ill. 196, where the Court said in 1881 (p. 202):

> "It would be difficult to suggest or conceive any cause that would present grounds more 'reasonable and proper' for suspending further payment of alimony than the subsequent marriage of the divorced wife. * * * The obligation implied in the marital relation resting on the husband to support his wife, remains, having all the binding efficacy it had at common law. Courts of equity will be slow to change

> that obligation in any case from the husband to another man, although he may once have been the husband of the wife. Aside from its positive unseemliness, such a policy finds no support in any equitable consideration. Treating alimony, as may be done, as the equivalent of that obligation for support which arises in favor of the wife out of the marriage contract, and which is lost when that contract is annulled by the decree, she obtains the same obligation for support by a second marriage. It is unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time. It is illogical as well as unreasonable. It is her privilege to abandon the provision the decree of the court made for her support under the sanctions of the law, for another provision for maintenance which she would obtain by a second marriage, and when she has done so the law will require her to abide her election. There is no reason why she should not do so."

The Illinois Court points out (R. 232) that the amendment of 1933 merely adopted the general rule, already established in Illinois, that remarriage was a proper ground for cancelling alimony payments and stated that the amendment merely made mandatory upon the courts what had theretofore been discretionary. There is nothing in the opinion to indicate that the Court cancelled the alimony payments provided by the decree of December 2, 1922, because of the act of 1933. It appears from the opinion (R. 232) that the alimony payments were cancelled because of the remarriage of Sara Adler, regardless of the new statute, and because of the change in the financial condition of Sidney Adler. The latter ground clearly has no relation to the legislation passed after the decree was entered.

The construction by the Illinois Supreme Court of Section 18 of the Illinois Divorce Act as it stood in 1922, and

as it had stood since 1845, is not subject to review by this Court.

Central Land Co. v. *Laidley,* 159 U. S. 103, 110.
Lehigh Water Co. v. *Easton,* 121 U. S. 388, 391.

As long ago as 1847 this Court said:

"It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Commercial Bank v. *Buckingham,* 5 How. 317, 343.

"The State courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."

Murdock v. *Memphis,* 20 Wall. 590, 626.

Clearly the decision of the Illinois Supreme Court in this case rests on local law. Where the decision of the State court rests on a non-Federal ground this Court has no jurisdiction to review the decision.

Richardson Machinery Co. v. *Scott,* 276 U. S. 128, 133.
People ex rel. v. *Atwell,* 261 U. S. 590, 592.
Bacon v. *Texas,* 163 U. S. 207, 216.

This Court is not required to reexamine the judgment of a State court simply because a Federal question may have been decided. To give it jurisdiction it must appear that such a question was necessarily involved in the decision.

New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.,* 125 U. S. 18, 29.
Moore v. *Mississippi,* 21 Wall. 636, 638.

If it were not clear from the opinion of the Illinois Supreme Court that it decided this case without reference to the amendment of 1933 to Section 18 of the Illinois Divorce Act, it is obvious that it could have decided the case by applying this statute prior to its amendment. Certainly it was not necessary to a decision of the case that the subsequently enacted amendment should be applied to cancel the alimony payments because of the changed conditions resulting from the remarriage of Sara Adler and the reduced financial ability of Sidney Adler to meet the heavy obligation to his former wife fixed by the documents of December 30, 1920, and the supplemental documents of December 1, 1922, incorporated in the alimony decree of December 2, 1922. Petitioner still has an income of $6,000 which is the equivalent of a three per cent net annual return on an estate of $200,000.

The Illinois Supreme Court, following long established practice in applying the provision of Section 18 of the Illinois Divorce Act which gives the Court authority to make such changes in the allowance of alimony from time to time as shall appear reasonable and proper, determined that the Circuit Court of Cook County had authority to cancel the allowance of $4,600 a year provided by the supplemental documents of December 1, 1922, incorporated in the decree of December 2, 1922, as a provision for alimony without reference to the subsequently enacted amendment to Section 18 of the Illinois Divorce Act. It concludes its opinion with the statement that "either the remarriage of respondent, [Sara Adler,] or the material impairment of the estate and income of petitioner, [Sidney Adler,] required a cancellation of all payments of alimony maturing after the date of the filing of the petition." (R. 232.)

In any event there was no retroactive application of the amendment of 1933. As the Illinois Supreme Court said

(R. 232), the trial court did not undertake to give the statute a retroactive effect, for the decree made the modification effective as of the date of the filing of the petition. All payments which had accrued prior to the filing of the petition were paid. Under the well established law, the only vested rights the petitioner had under the alimony decree were as to payments already due.

Sistare v. *Sistare*, 218 U. S. 1.

Respectfully submitted,

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Attorney for Respondent.